Supreme Court, U.S.
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No. 99-

IN THE

Supreme Court of the United States

GENERAL PUBLIC UTILITIES CORPORATION, *et al.*,

Petitioners,

v.

FRED N. ABRAMS, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The trial court consolidated for pretrial purposes this "mass tort" litigation arising out of the 1979 Three Mile Island accident, and set schedules for the completion of fact and expert discovery. After discovery was closed, the district court determined that much of the expert testimony proffered on behalf of all the plaintiffs was inadmissible under this Court's decision in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), and granted summary judgment dismissing all the plaintiffs' claims. The Court of Appeals for the Third Circuit reversed, holding that the Seventh Amendment prevented summary judgment against the plaintiffs in the consolidated proceedings whose claims had not also been designated for a planned "test case" trial, because they had not made a "positive manifestation of agreement" to participate in the summary judgment proceedings.

The question presented is whether there is any basis for the Court of Appeals' holding that in the absence of a "positive manifestation of agreement" by a plaintiff to participate in summary judgment proceedings, the Seventh Amendment guarantee of the right to a trial by jury precludes the entry of summary judgment against that plaintiff.

LIST OF ALL PARTIES TO THE PROCEEDING BELOW AND CORPORATE DISCLOSURE STATEMENTS

A. Petitioners

The following companies are petitioners (all defendants/appellees in the courts below):

General Public Utilities Corporation; Metropolitan Edison Company; Jersey Central Power & Light Company; Pennsylvania Electric Company; McDermott Incorporated (previously known and identified as J. Ray McDermott & Company); Raytheon Constructors Inc. (previously known and identified as Catalytic, Inc.); Burns & Roe Enterprises, Inc.; and Dresser Industrial Valve and Instrument Division of Dresser Industries, Inc.

B. Respondents

The respondents, plaintiffs/appellants in the courts below, are listed in J. App. 684a-747a. In addition, The Babcock & Wilcox Company, Inc.,[1] is being served as a respondent herein.

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1. Not participating as a petitioner because of the "automatic stay" set forth in Bankruptcy Code § 362, 11 U.S.C. § 362, as a consequence of the bankruptcy proceedings captioned *In re The Babcock & Wilcox Company, Inc., et al.*, Case No. 00-10992, in the United States Bankruptcy Court for the Eastern District of Louisiana.

C. Rule 29.6 Statements

Metropolitan Edison Company, Jersey Central Power & Light Company, and Pennsylvania Electric Company, are each wholly-owned subsidiaries of General Public Utilities Corporation. No publicly held company owns 10% or more of the stock of General Public Utilities Corporation.

McDermott Incorporated is a wholly-owned subsidiary of McDermott International, Inc. The Prudential Insurance Company of America owns more than 10% of the stock of McDermott International, Inc.

Burns & Roe Enterprises, Inc. is a wholly-owned subsidiary of Roe Enterprises, Inc., which is a wholly-owned subsidiary of Winona Hudson Corporation, which is a wholly-owned subsidiary of Warwick and York, Inc. No publicly held company owns 10% or more of the stock of Warwick and York, Inc.

Raytheon Constructors Inc. is a wholly-owned subsidiary of Raytheon Constructors International, Inc., which is a wholly-owned subsidiary of Raytheon Engineers & Constructors International, Inc., which is a wholly-owned subsidiary of Raytheon Company. Franklin Resources, Inc. owns more than 10% of the stock of Raytheon Company.

Dresser Industries, Inc. is a wholly-owned subsidiary of Halliburton Company. No publicly held company owns 10% or more of the stock of Halliburton Company.

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Other Authorities:

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9 Wright & Miller, Federal Practice and Procedure: Civil 2d § 2382 (1995) 7

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10 C.F.R. § 20.1004 (1997) 5

Petitioners respectfully request that a writ of certiorari be issued to review the judgment of the Third Circuit Court of Appeals in this case.

OPINIONS BELOW

All of the following opinions[2] are published: *In re TMI Litigation*, 193 F.3d 613 (3d Cir. 1999) (J. App. 1a); *In re TMI Litigation*, 199 F.3d 158 (3d Cir. 2000) (J. App. 275a); *In re TMI Litig. Cases Consol. II*, 910 F. Supp. 200 (M.D. Pa. 1996) (J. App. 664a); *In re TMI Litig. Cases Consol. II*, 911 F. Supp. 775 (M.D. Pa. 1996) (J. App. 537a); *In re TMI Litig. Cases Consol. II*, 922 F. Supp. 997 (M.D. Pa. 1996) (J. App. 394a); *In re TMI Litig. Cases Consol. II*, 922 F. Supp. 1038 (M.D. Pa. 1996) (J. App. 497a); *In re TMI Litig. Consol. Proceedings*, 927 F. Supp. 834 (M.D. Pa. 1996) (J. App. 295a).

JURISDICTIONAL STATEMENT

Jurisdiction to review the decision by the United States Court of Appeals for the Third Circuit dated November 2, 1999, the timely petition for rehearing of which was denied by order dated January 4, 2000 (J. App. 682a), is conferred by 28 U.S.C. § 1254(1).

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2. Since both the petitioners and respondents are filing petitions for writ of certiorari in this matter, a separate bound Joint Appendix (J. App.) is being filed herewith.

CONSTITUTIONAL PROVISION INVOLVED

United States Constitution, Seventh Amendment:

> In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

STATEMENT OF THE CASE

Petitioners, defendants below, were sued by more than 2000 individuals who had been in the vicinity of the Three Mile Island (TMI) nuclear plant around the time of the 1979 accident there. Plaintiffs claimed that radiation released in that accident caused them to develop one or another disease, including cancers, benign tumors, or other health problems. Those suits were commenced at varying times, primarily in the mid 1980s. Most of the suits were commenced in Pennsylvania state court, where they were consolidated for pretrial proceedings by order of the Court of Common Pleas of Dauphin County, Pennsylvania. Hundreds of the plaintiffs in those Pennsylvania suits, anticipating a problem under Pennsylvania's two year statute of limitations, also commenced actions in federal court in Mississippi based on diversity jurisdiction, in an effort to secure the benefit of that state's six year statute of limitations for personal injury actions.[3] Those actions were transferred to the federal court

3. *Cf. Ferens v. John Deere Co.*, 494 U.S. 516 (1990) (under Mississippi choice of law rules, Mississippi statute of limitations would apply to actions commenced in Mississippi, even though (Cont'd)

in the Middle District of Pennsylvania pursuant to 28 U.S.C. § 1404(a). Those plaintiffs also filed an additional action in Mississippi state court, naming a non-diverse defendant, as a further protective effort.

Because these suits involve claims that radioactive material released in the TMI accident caused personal injury, they are "public liability actions" within the Price-Anderson Act which, as amended in 1988, created federal jurisdiction for all public liability actions. *See* 42 U.S.C. § 2014(hh) (definition of "public liability action"), 42 U.S.C. § 2210(n)(2) (federal jurisdiction for "public liability actions"). Pursuant to those 1988 amendments, defendants removed all the then pending state court actions, both Pennsylvania and Mississippi, to the Middle District of Pennsylvania.

After a hiatus during which the constitutionality of the 1988 Price-Anderson amendments was determined, the District Court for the Middle District of Pennsylvania made several procedural orders. So far as the question presented here is concerned, the important ones were:

1. All orders previously entered in any of the pending actions were deemed to have been entered in the Middle District. By this order, the consolidation for pretrial proceedings effected in Pennsylvania state court was expressly continued in the federal action, just as it had effectively been transported by 28 U.S.C. § 1450 (all orders

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(Cont'd)
plaintiff and defendant were domiciled elsewhere and accident occurred elsewhere; Mississippi limitations period would apply following transfer to forum where plaintiffs resided and accident occurred).

prior to removal "remain in full force and effect until dissolved or modified by the district court").

2. To eliminate the multiplicity of suits by the same individuals, and streamline the multiplicity of different civil actions, all the actions but one were dismissed pursuant to stipulation of counsel, and every plaintiff in every action was thereafter to be treated as a plaintiff in the one consolidated action.

3. A protocol was established to differentiate, in the one consolidated action, between pleadings applicable to all plaintiffs, and pleadings applicable to just a few plaintiffs: if a pleading related to all plaintiffs, it was to so state in the caption; if a pleading related to one or an identified subset of plaintiffs, it was to identify the counsel for those plaintiffs on the first page of the caption, and to list the individual plaintiffs on a second page of the caption.

4. The court established deadlines applicable to "all plaintiffs" for discovery, including the submission of expert reports pursuant to Fed. R. Civ. P. 26(a)(2).

5. The court adopted a "test case" approach for trial, pursuant to which counsel for all plaintiffs were to select six cases for an initial trial, and counsel for defendants were also to select six plaintiffs for that initial trial. In effect, the court "severed" for trial the claims of the twelve plaintiffs so selected from the mass of over two thousand plaintiffs, while in all other respects the litigation proceeded as a single consolidated case.

Following entry of these orders, plaintiffs' counsel filed and served, as applicable to all plaintiffs, a number of expert

reports. Plaintiffs' "dose" experts opined that the accident had caused people in the vicinity of Three Mile Island to receive doses of one hundred or more rems.[4] Plaintiffs' medical causation experts opined that if plaintiffs received a dose of ten rems or more, such a dose more likely than not caused their cancers or neoplasms.

The district court set a schedule, applicable to "all plaintiffs," for any *in limine* motions directed to proposed expert testimony, and consequent summary judgment motions. Defendants filed *in limine* motions directed to most of plaintiffs' experts, and the district court, after extensive hearings, largely granted those motions as to the dose experts. J. App. 394a, 497a, 537a, 664a. Defendants then filed a motion for summary judgment applicable to "all plaintiffs." Defendants argued that because the *in limine* rulings rendered "all plaintiffs" unable to prove that they had been exposed to any appreciable radiation, and because the causation expert opinions were expressly contingent on proof that each plaintiff had received a dose of ten rems or more, plaintiffs would be unable to make out a prima facie case. All plaintiffs, through their counsel, opposed the motion. They did not interpose an affidavit pursuant to Fed. R. Civ. P. 56(f), stating what additional affidavits or discovery (the deadline for which had passed in any event) they needed to oppose the motion.

The district court agreed with defendants' argument and entered summary judgment dismissing the claims of all plaintiffs. J. App. 295a.

On appeal, the Court of Appeals for the Third Circuit affirmed the district court's rulings excluding most of

4. A "rem" is defined in 10 C.F.R. § 20.1004 (1997).

plaintiffs' proffered expert testimony, and affirmed the entry of summary judgment dismissing the claims of the "test case" plaintiffs. J. App. 1a.

The Court of Appeals ruled, however, that the Seventh Amendment prevented dismissal of the claims of all the other plaintiffs. It wrote:

> . . . The extension of the summary judgment decision to the Non-Trial Plaintiffs implicates their Seventh Amendment jury trial rights. Summary judgment does not violate a party's Seventh Amendment jury trial rights so long as the person having the right to the jury trial is an actual participant in the summary judgment proceeding. . . . However, absent a positive manifestation of agreement by Non-Trial Plaintiffs, we cannot conclude that their Seventh Amendment right is not compromised by extending a summary judgment against the Trial Plaintiffs to the non-participating, non-trial plaintiff. In fact, a Seventh Amendment argument was made in the District Court, but the argument was summarily dismissed.

J. App. at 263a-64a. (citations omitted).[5]

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5. The Court of Appeals' reference to the "non-participating, non-trial plaintiff" is puzzling. Counsel for all plaintiffs were served with all motions and briefs designated as applicable to "All Plaintiffs," and with all Orders establishing deadlines applicable to "All Plaintiffs." Pursuant to Fed. R. Civ. P. 5(b), service upon a party represented by an attorney "shall be made upon the attorney

(Cont'd)

ARGUMENT

The decision below erects an impediment to, and thereby compromises the utility of, two important procedural devices. The device of consolidation for pretrial purposes is recommended by the *Manual for Complex Litigation, Third*, for "all related cases pending or which later may be filed in the same court. . . ." § 20.123 (3rd ed. 1995). "Pretrial proceedings in these cases *should be* coordinated or consolidated under Fed. R. Civ. P. 42(a). . . ." *Id.* (emphasis added). The *Manual* identifies "mass tort litigation" as a type of case exampling the need for effective judicial management, to "help control cost and delay fairly." *Id.* at § 10.1. *See also* 9 Wright & Miller, Federal Practice and Procedure: Civil 2d § 2382 (1995) ("Consolidation of actions in their pretrial stage, under many circumstances, will be a desirable administrative technique and is within the power of the court.").

Even more important is the "traditional authority of trial judges to grant summary judgment in meritless cases." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986) (quoting Bork, Circuit Judge, dissenting below, *Catrett v. John-*

(Cont'd)
unless service upon the party is ordered by the court." No such order requiring service upon the parties, rather than their attorneys, was made here.

Similarly, the Court of Appeals' characterization of the district court's having "summarily dismissed" the plaintiffs' Seventh Amendment argument implies that the district court had not given the issue the attention it deserved. As is shown next, however, the plaintiffs' Seventh Amendment argument was without any basis, and therefore the district court was correct in rejecting that argument without extensive discussion.

Mansville Sales Corp., 756 F.2d 181, 187 (D.C. Cir. 1985)). In *Celotex* this Court observed that "[o]ne of the principal purposes of the summary judgment rule is to isolate and dispose of factually unsupported claims. . . ." *Id.* at 323-24. Indeed, this Court wrote:

> Summary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole, which are designed "to secure the just, speedy and inexpensive determination of every action."

Id. at 327 (citation omitted).

Celotex also established that the twin protections to which the target of a summary judgment motion is entitled are (1) "notice that she had to come forward with" evidence opposing the motion, and (2) an opportunity to conduct discovery, secured by the Rule 56(f) affidavit, in order to protect against being "railroaded" by a premature motion. *Id.* at 326.

That both Fed. R. Civ. P. 42 and 56 were properly invoked by the district court here can hardly be gainsaid. All the pending actions involved claims that a single event — the March, 1979 accident at the Three Mile Island Unit 2 nuclear reactor — caused plaintiffs' various health problems. Use of Fed. R. Civ. P. 42(a) to consolidate these multiple actions for pretrial purposes, when they all arose out of the same event, represented a paradigmatic application of that rule.

Similarly, the summary judgment motion was hardly "premature," since the consolidated actions had been open to discovery for nearly a decade, J. App. at 255a, and by the time of the motion, discovery was closed for all plaintiffs. *Id.* at 267a. In addition, all plaintiffs were on notice that defendants' summary judgment motion was directed to them, since it was captioned as applicable to "all plaintiffs." *Id.* at 22a-23a. And as the Court of Appeals' opinion acknowledged, plaintiffs' opposition to the motion included a Seventh Amendment argument on behalf of the Non-Trial Plaintiffs. *Id.* at 264a (citing 927 F. Supp. at 838 n.7) (J. App. at 302a n.7).[6]

To require a record that also reflects each plaintiff's "positive manifestation of agreement," *id.*, to submit to the summary judgment procedure imposes a burden that is as unlikely of fulfillment as it is unauthorized by any of the Rules adopted by this Court's orders promulgating or amending the Federal Rules of Civil Procedure. No plaintiff would offer "positive manifestation of agreement" to submit to summary judgment procedures, when that plaintiff's singular goal is to get his or her case, however unfounded, before a jury. Every plaintiff desiring to resist a summary judgment motion would likely avail himself or herself of the simple expedient of refraining from supplying a "positive manifestation of agreement" to submit to the Rule 56 procedure. This, undoubtedly, is why the Federal Rules of Civil Procedure make no mention whatsoever of such a requirement.

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6. Inasmuch as "all plaintiffs" submitted expert reports, briefed the *in limine* motions, and briefed the summary judgment motion, it is perplexing, as noted above, why the Court of Appeals characterized the non-trial plaintiffs as "non-participating."

Nor does any prior decision from this Court, or any other Court of Appeals, even hint at such a requirement. The standard created by the Court of Appeals for the Third Circuit, in the decision below, would effectively revoke Rule 56 for that Circuit, in cases consolidated under Rule 42. But only this Court has such authority under the Rules Enabling Act, 28 U.S.C. § 2072.

Moreover, Congress itself intended, in creating federal jurisdiction for all public liability actions, that such actions would thereby receive the benefit of consolidation and coordination in accordance with the Federal Rules of Civil Procedure:

> The availability of the provisions for the consolidation of claims in the event of any nuclear accident . . . would avoid the inefficiencies resulting from duplicative determinations of similar issues in multiple jurisdictions that may occur in the absence of consolidation.

S. Rep. No. 100-218, at 13 (2nd Sess. 1988), *reprinted in* 1988 U.S.C.C.A.N. 1476, 1488.

The decision by the Court of Appeals, which gives plaintiffs' counsel a right to veto the Federal Rules of Civil Procedure, if they choose, thus presents such a departure from the "accepted and usual course of judicial proceedings . . . as to call for an exercise of this Court's supervisory power." S. Ct. R. 10(a). No other court presiding over mass tort litigation consolidated for pretrial proceedings has ever required that a plaintiff must somehow exhibit a "positive manifestation of agreement" to be bound by discovery deadlines, discovery submissions, *in limine* rulings, or

summary judgment proceedings, before the Seventh Amendment permits entry of a summary judgment against that plaintiff. When that plaintiff has notice of all applicable proceedings, through notice to his or her counsel; when that plaintiff, through counsel, submits expert witness reports in the consolidated discovery process; when that plaintiff, through counsel, receives notice that a motion for summary judgment has been filed seeking dismissal of that plaintiff's claim; when that plaintiff, through counsel, appears and opposes the motion; in these circumstances, there should be no doubt that the Seventh Amendment does not prevent use of the summary judgment device for the dismissal of unsupportable claims.

Review is necessary then, not just because of the inefficiency imposed on this litigation, already well over a decade old, and involving thousands of plaintiffs. Review is also necessary so that other district courts, in this period of increasing docket pressure, are not denied access to the efficiency-enhancing procedural devices which the Rules of Civil Procedure adopted by this Court have intended them to have.

CONCLUSION

The Petition for Writ of Certiorari should be granted, and the decision of the Court of Appeals for the Third Circuit reversing summary judgment as to the "Non-Trial Plaintiffs" should receive plenary review.

Respectfully submitted,

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